

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

Claimant alleges a series of injuries beginning in October 1998 and ending on December 12, 1998, the claimant's last day worked before going to the emergency room. Claimant alleges his injury occurred as a result of the substantial lifting required by his job as an appliance salesman for respondent. Claimant recalls moving refrigerators on a regular basis and feeling back pain. On one occasion, he felt he had "wrenched" his back, but he wasn't sure on what date.

Claimant sought medical treatment on December 12, 1998, when he went to the emergency room at St. Francis Hospital. Claimant had earlier been seen at Stormont-Vail HealthCare on November 11, 1998, at which time he complained of back pain and gave a history of a gradual onset, beginning sometime in early November 1998.

The medical records of St. Francis Hospital do indicate that claimant's condition was "not accident related." However, several of the medical records, including the records of December 12 and December 16, 1998, mention the fact that claimant is a salesperson at an appliance store and lifts boxes on a regular basis. The St. Francis Hospital medical report of December 16, 1998, discussed the shooting pain claimant experienced down his leg, and the fact that he had been unable to work. It also noted that claimant lifts boxes at an appliance sales store.

Respondent contends claimant did not suffer accidental injury as alleged, and further contends claimant failed to advise respondent in a timely fashion of the injuries. Both Thomas Kessler, claimant's supervisor and a merchandiser for respondent, and Vince Zabala, respondent's human resources specialist, had been advised by claimant that he had been diagnosed with possible Crohn's disease and possible colon cancer. Both thought that claimant's back pain, when discussed before December 12, 1998, was related either to the Crohn's or the cancer.

However, the November 2, 1998, diagnostic radiology report from St. Francis Hospital found no evidence of Crohn's disease identified. In addition, the intestinal examinations failed to find any evidence of tumor or other abnormality. This would indicate that, after the first week of November, claimant was aware that both the Crohn's disease and the cancer tests had come back negative. This, coupled with the December medical reports from St. Francis Hospital, indicates that the claimant suspected some connection between his back pain and the lifting required at his job.

Respondent argues that claimant's back pain may stem from the damage caused during a motor vehicle accident suffered several years before. However, the medical evidence does not support this finding. While claimant was in a motor vehicle accident,

it appears that the symptoms from that accident did resolve prior to the incidents with claimant's employment.

It is claimant's burden to establish his right to an award of compensation in workers' compensation litigation. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

For preliminary hearing purposes, the Appeals Board finds that claimant has proven accidental injury arising out of and in the course of his employment. Medical reports do allude to the lifting required at the claimant's job. While the evidence is not definitive, the Appeals Board finds it is convincing enough for preliminary hearing purposes.

Respondent also contends that claimant did not provide notice of the accident as required by K.S.A. 44-520. By statute, claimant has 10 days to provide notice of the accident to respondent. Claimant alleges accidental injuries through December 12, 1998. Both Mr. Kessler and Mr. Zabala acknowledged claimant discussed his back pain with them, but deny any allegations by claimant that it was related to work. Claimant acknowledged that, while he did discuss his back pain, he does not specifically remember relating it to his employment. Mr. Zabala acknowledged that, when claimant went to St. Francis Hospital, he went there not only for the Crohn's disease and the cancer, but also for treatment for claimant's back. Within one week of claimant leaving work, he discussed with claimant the fact that claimant was off work for the cancer, the Crohn's disease and the back pain. The Appeals Board finds, for preliminary hearing purposes, that claimant did provide notice to respondent of his back injuries associated with the substantial lifting required at his job.

If notice had not been proven, then the period for providing notice would have been extended to 75 days from the date of accident under K.S.A. 44-520, if just cause were found for claimant's failure to notify respondent. As notice is a very close question in this incidence, the Appeals Board will also consider whether just cause existed, which would allow claimant the additional time to provide notice.

Here, claimant had several physical problems ongoing, all of which could potentially have caused him to experience back pain. When considering whether just cause exists for extending the providing of notice, the Appeals Board has, in the past, listed several factors to be considered. Although not intended as an exhaustive list, some of the factors, which have been considered in the past in determining whether just cause exists, are:

- (1) The nature of the accident, including whether the accident occurred as a single traumatic event or developed gradually.
- (2) Whether the employee is aware that he or she has sustained either an accident or an injury on the job.

- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2. Russell v. MCI Business Services, Docket No. 201,706 (October 1995).

Here, the claimant suffered a gradually developing problem in his low back, which may have been related to lifting, Crohn's disease or cancer. While claimant was aware that he was having difficulties, it is understandable that claimant might not know or be aware that he had sustained an on-the-job injury, with the gradual nature of these symptoms. It is acknowledged that respondent posted the appropriate notices as required by K.A.R. 51-12-2(a). However, again, it is understandable that, with the gradual onset of claimant's symptoms, intermingled with the potential non-work-related causes, claimant could be confused regarding whether he had actually suffered an injury on the job or was merely experiencing symptoms from a non-work-related disease. The Appeals Board would, therefore, find that claimant had just cause for failing to provide notice within 10 days.

Here, the E-1 was filed by claimant with the Director of Workers Compensation on January 5, 1999, within the 75-day limit set by K.S.A. 44-520.

Finally, the Appeals Board is asked to consider whether the Administrative Law Judge erred in backdating the temporary total disability compensation to December 12, 1998, which predates the application for hearing filed in this matter. Respondent contends that K.A.R. 51-3-5a requires a finding by the administrative law judge of highly unusual circumstances before temporary total disability compensation and medical compensation are ordered for the period of time prior to the filing of the claimant's application. Before the Appeals Board can consider that specific issue, it must determine whether it has jurisdiction to decide an issue dealing with the granting of temporary total disability compensation. K.S.A. 1997 Supp. 44-534a requires certain criteria be followed when appealing from preliminary hearing orders. K.S.A. 1997 Supp. 44-551 limits the rights of a party to appeal from a preliminary hearing order to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested. Specific jurisdictional issues, listed in K.S.A. 1997 Supp. 44-534a, include whether claimant suffered an accidental injury, whether the injury arose out of and in the course of employment, whether notice is given and claim timely made, or whether certain defenses apply. The issue regarding claimant's entitlement to temporary total disability compensation is not one of those contained in K.S.A. 1997 Supp. 44-534a. In addition, K.S.A. 1997 Supp. 44-534a allows an administrative law judge to make decisions regarding temporary disability and medical benefits from a preliminary hearing. Therefore, the Administrative Law Judge did not exceed his jurisdiction in granting the temporary benefits, even though there may be some question regarding when these benefits would or would

not begin. The Appeals Board, therefore, finds that respondent's appeal on that issue is dismissed.

Finally, if the Appeals Board did take jurisdiction of this issue, it would simply point out that K.A.R. 51-3-5a was modified effective May 22, 1998, to eliminate the need for "highly unusual circumstances" before an administrative law judge may award compensation for the period of time prior to the filing of the application.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated April 22, 1999, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 1999.

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BOARD MEMBER

c: Seth G. Valerius, Topeka, KS  
Michelle Daum Haskins, Kansas City, MO  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director